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Supreme Court of the United States

October Term, 1930

No. 57

STORY PARCHMENT COMPANY,
Plaintiff-Petitioner

v.

THE PATERSON PARCHMENT PAPER COMPANY
and
KALAMAZOO VEGETABLE PARCHMENT COMPANY
Defendants-Respondents

BRIEF FOR RESPONDENTS

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JOSEPH W. DORAN,
For Respondents.

November, 1930.

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BRIEF FOR RESPONDENTS

The plaintiff's petition attacks a judgment of the Circuit Court of Appeals for the First Circuit entered January 23, 1930 (R. 628) pursuant to an opinion of that Court (R. 613; 37 Fed. (2d) 537). This judgment vacated a judgment of the District Court in Massachusetts for the plaintiff, and directed the entry of a judgment therein for the defendants.

The action is at law to recover damages which the plaintiff alleges that it has suffered (R. 9) as a result of the alleged acts of the defendants and West Carrollton Parchment Company in pursuance of an alleged conspiracy to monopolize the interstate trade in vegetable parchment and to destroy the alleged established business of the plaintiff by the concerted reduction of prices (R. 8).

It is submitted for the defendants that the judgment of the Circuit Court of Appeals was right, because:—

First: There is no evidence that the plaintiff was injured by the acts of the defendants;

Second: There is no evidence that the defendants' acts were a combination to monopolize or to restrain trade;

Third: The plaintiff has had a trial by jury which has resulted in a verdict for the defendants which calls for judgment for the defendants.

The judgment of the Circuit Court of Appeals was based on the first of these contentions (R. 616). It should be affirmed for the second, also. The judgment for the defendants sustained the defendants' first assignment of errors (R. 607, 613, 621). If this judgment was vacated, the remaining five assignments of error would require consideration by the Circuit Court of Appeals. It is assumed that as these have not been considered by the Circuit Court of Appeals they should not be argued before this Supreme Court but that they would be remitted for consideration by the Circuit Court of Appeals, if the judgment of that Court was not affirmed.

The defendants offered no evidence. There was no issue for the jury to pass upon between the evidence introduced by the plaintiff and that introduced by the defendants. The evidence introduced by the plaintiff showed no case entitling the plaintiff to judgment.

FIRST

THERE IS NO EVIDENCE THAT THE PLAINTIFF WAS INJURED BY THE ACTS OF THE DEFENDANTS

Manifestly the plaintiff in this case has no cause of action under the statute unless it has been "injured in his business or property by reason of" a misdemeanor or crime committed by the defendants and of a character denounced by the statute.

United States Code, Title 15, §15, §1, §2.

It is not enough to show that the defendants did wrong. It must appear that the injury suffered by the plaintiff was caused by that wrong.

Atchison, Topeka & Santa Fe Railway Co. v. *Toops*, 281 U. S. 351, 354, 357.

Jack v. *Armour* (C.C.A. 8th), 291 Fed. 741, 745.

Unless there is more than a scintilla of evidence of this, the verdict should be directed for the defendants.

Gunning v. *Cooley*, 281 U. S. 90, 94, dictum.

The plaintiff has suffered the consequences of attempting to enter an overcrowded industry with insufficient capital. Not only is this unanswerably shown by the evidence introduced by the plaintiff, but also there is no evidence whatever that the plaintiff's losses flowed from a combination of the defendants even if it be assumed that there was such a combination.

The plaintiff claims that its losses were due to a combination of the defendants to reduce prices.

If the plaintiff was injured by a reduction of prices, it was injured by its own reduction of its own prices and not by a combination of the defendants to reduce the defendants' prices.

There is no evidence whatever that the *plaintiff* in the effort to get trade would not have reduced prices just

as much as it did reduce them even if the defendants had not combined to reduce prices.

There is no evidence whatever that the *defendants severally*, in their effort to meet the plaintiff's competition, would not have reduced prices just as much as they did reduce them even if the defendants had not combined.

There is no evidence whatever that if the plaintiff had not reduced prices the plaintiff would have succeeded in business or that it would have avoided the insolvency and cessation of business which it encountered.

There is no evidence whatever as to what amount of goods the plaintiff would have sold if the plaintiff had not reduced its prices.

The inevitable logical conclusion from the evidence which was introduced, that the plaintiff would not have succeeded, adds emphasis to the total absence of any evidence to the contrary. This is emphasis only. The controlling fact is the absence of any evidence to support the plaintiff's contention.

The plaintiff, ignoring this lack of evidence, contends for two elements of damages, namely, (1) the difference between the amount which the plaintiff received for its parchment and the amount which it would have received for this parchment if it had sold this parchment at the prices at which the defendants were selling before the reductions and in the claimed amount of $20,000, and (2) the difference between the value of its plant which had cost $235,000, and the estimated value of this plant when this suit was begun June 3, 1928, $75,000. If no one of these two items in some ascertainable amount was proved as the incurrence due to a combination of the defendants, no injury to the plaintiff was shown.

It is a guess, only, and an impossible one even so, that these losses resulted from the combination.

A guess, however probable, is not enough. Damages resulting from the defendants' unlawful acts and in an

amount susceptible of expression in figures proved by facts from which their existence is logically and legally inferable and not supplied by conjecture, is an essential element of a cause of private action under the Anti-Trust Acts.

Keogh v. *Chicago & Northwestern Ry. Co.*, 260 U. S. 156, 165, semble.

American Sea Green Slate Co. v. *O'Halloran*, (C.C.A. 2d), 229 Fed. 77, 80.

What larger sum the plaintiff would have made between November 1, 1927, when it began business, and September 1, 1928, when it had ended, if conditions had been different from what they were, is too speculative to warrant a recovery.

Two cases just cited.

Sussex Land & Live Stock Co. v. *Midwest Refining Co.*, (D. C. Wyo.) 276 Fed. 932.

Chicago Life Ins. Co. v. *Tiernan*, (C.C.A. 8th) 263 Fed. 325.

McCornick v. *U. S. Mining Co.*, (C.C.A.8th) 185 Fed. 748.

Central Coal & Coke Co. v. *Hartman*, (C.C.A.8th) 111 Fed. 96.

The fact that one manufacturer could make profits in a given line of business is not evidence that another in the same line with equal advantages would do so.

Keystone Mfg. Co. v. *Adams*, 151 U. S. 139.

Disbelief of evidence is not proof of the contrary.

Northern Railway Co. v. *Page*, 274 U. S. 65, 75.

As to the two elements claimed, there was a total absence of evidence of the essentials following:—

(1) There is no evidence that the plaintiff could have sold the same amount of goods at the higher prices. It is inconceivable that the plaintiff could have sold exactly

the same amount of goods at the higher prices. There is no evidence of what amount it could have sold. There is nothing on which to base a guess.

(2) There is no evidence that the plaintiff would not have reduced its prices somewhat and even as much as it did, if the defendants had not combined. On the contrary, on the plaintiff's own evidence, for the purpose of getting trade the plaintiff had made its own discounts, concessions, reductions and cuts before those made by any of the defendants, and plaintiff continued to make them thereafter.

(3) There is no evidence that the plaintiff's reduction of prices was due to the defendants' combination. The plaintiff's own evidence shows the contrary, and that the plaintiff led the field over the declivity.

(4) There is no evidence that even if the plaintiff's reductions were due to the defendants' reductions, they, in turn, were due to the defendants' *combination*. On the contrary, when the plaintiff, according to its own evidence, started the price war, it is incontrovertible that each defendant for its own preservation would have made the reductions even if they had not combined to do so.

(5) There is no evidence that prices will not be reduced by competitors even if the prices theretofore are reasonable. (*Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U. S. 156, 161.) In the price war which the plaintiff projected, the probability that the reductions would have been made, adds emphasis. Combination may be thought a necessary protection for an increase of prices whereby one of the combiners might otherwise lose trade to the other. No such protection by combination is required for the safe reduction of prices. Properly analyzed, plaintiff's contention really is that it had acquired a vested right (R. 618) to have the defendants continue to combine to keep up prices.

(6) There is no evidence of any damage except that "the plaintiff had sustained a loss as a result of its unsuccessful attempt to break into the vegetable parchment industry" (R. 598).

(7) There is no evidence of what the plaintiff's plant would have been worth June 3, 1928 if the defendants had not combined, and, therefore, no evidence of the diminished value of that plant because of any combination. This is true even if it be assumed that the cost of $235,000 measured its value to a prosperous concern and that $75,000 measured its value to a dying concern.

(8) There is no evidence that the plant would have been worth more than $75,000 to a dying concern.

(9) There is no evidence that the plaintiff could have survived under any circumstances. On the contrary, the plaintiff's evidence showed no prospect of success. At best, plaintiff's business did not exceed one-half its capacity (R. 560). There is no evidence that the plaintiff's bulk of business was diminished by reductions in prices because the plaintiff's evidence is that the plaintiff equalled or exceeded the reductions and did so before they were made and so lost no trade because of keeping up prices. There is no evidence that if the plaintiff had done the same bulk of business at the old prices the plaintiff's gross return would have been increased more than the $20,000 above claimed.

(10) There is no evidence that $20,000 would have been enough to save the plaintiff from financial disaster. The plaintiff's own evidence showed the contrary. The plaintiff's entire capital was $204,000 (R. 547, 578). The plaintiff's plant cost $235,000 (R. 563), or more than $30,000 in excess of the plaintiff's capital. Therefore the plaintiff's working capital was a deficit of $30,000. By the Fall of 1928 the plaintiff was a judgment debtor for $135,000 (R. 593). There is no evidence that $20,000 more gross income would have saved this situation.

(11) There is no evidence that in June, 1928, under any circumstances there would have been a prosperous concern available to use the plant.

(12) There is no evidence that under any circumstances the plant would have had a market value in excess of $75,000 in June, 1928. Three-fourths of the expense for this plant was for machinery and equipment for this specialty (R. 579).

(13) There is no evidence that the plaintiff sustained any loss except the natural consequence of an attempt to go into an overcrowded industry where there was no prospect of success (R. 522, 583).

(14) There is no evidence that the plaintiff's loss did not result solely from an unwise investment.

(15) There is no evidence that the plaintiff could have made a financial success.

(16) There is no evidence that the plant which the plaintiff has, is not just as valuable as it ever was.

(17) There is no evidence that the reductions in prices were not the natural consequence of the plaintiff's act when "its first effort to obtain trade was to deal direct with the large packers and jobbers and offer a five per cent discount on the prices then offered by the defendants" (R. 615).

(18) There is no evidence that the plaintiff's loss was not due to the fact that, although the plaintiff or those who organized it knew (R. 615) when it entered the field that there were only three manufacturers in the field who sold at a uniform price and that there was an overcapacity and no prospective increase in demand in excess thereof, they entered the field with a price-cutting war which would inevitably bring price reductions by competitors whether they combined or not.

(19) There is no evidence that the plaintiff's losses, however described, were anything but a failure to get larger future improbable profits from the hoped-for

operations of a business which never was established and had no experience measurement.

(20) There is no evidence that if there was no combination, the existing prices would have remained stable or even reasonable under the onslaught of the plaintiff's price-cutting competition.

(21) There is no evidence that each defendant would not, independently of the other, under the rule of self preservation, have reduced prices to meet the plaintiff's competition as much or more than they were reduced.

(22) There is no evidence that lifts the relation between the plaintiff's loss and the combination of the defendants above an impossible guess.

SECOND

THERE IS NO EVIDENCE THAT THE DEFENDANTS' ACTS WERE A COMBINATION TO MONOPOLIZE OR TO RESTRAIN TRADE

The plaintiff urges that the defendants by this contention are asking the Court to reverse a divisible part of a judgment which cannot be done because the defendants have not appealed or sought certiorari. The claim is unfounded. The plaintiff does not ask reversal of any part of a judgment. The Circuit Court of Appeals has given judgment for the defendants. The defendants say that this judgment is wholly right. They ask only its affirmance.

The only evidence in this case is from witnesses called by the plaintiff and the exhibits introduced through them. They were: *Leonhard* — Paterson's General Manager in Charge of Manufacturing (R. 473), *Cashmore* — Paterson's Treasurer (R. 477), *Kindleberger* — Kalamazoo's President (R. 518), *Southon* — Kalamazoo's Sales Manager (R. 527), *Moyer* — West Carrollton's Manager (R. 538), *Goldmann* — Story's Treasurer (R. 546), *Story* — one of Story's directors (R. 586), *Stearns* — one of Story's directors (R. 587), and *Levin* — the originator of the Story project (R. 589, 590). The first five of these witnesses were not cross-examined.

Many letters between the respective defendants and their respective salesmen were in evidence showing the information which the respective defendants had concerning the activities of the plaintiff and the reduction policy which the plaintiff had launched. The extent to which these letters were admitted in evidence was stated by the Court, namely:— "First, about the inter-office correspondence. I have no doubt that you still have in mind my remarks when I ruled upon the admissibility of the letters. They are admissible in this case because

they convey information both to the defendants and to the — some of the — I think that perhaps I am wrong about that; I think that the inter-office correspondence would only tend to convey information to the defendants, and that becomes important because it enables you to know what information the defendants had before them when they acted, because, as I will point out a little later, the motives of the defendants in their conduct become a very important factor in this case. *The letters are not evidence of the facts which the writer may undertake to convey.* (Not italics in original.) We are only interested in the fact that the information was conveyed, not with the truth or falsity of the information" (R. 602).

The Court added to this later, that where letters were written by the defendants rather than by the agents they could be used as admissions of the defendant who wrote them (R. 603) but that they would not be admissions of another defendant unless a conspiracy had been shown and the letter was written in furtherance or pursuance of that conspiracy (R. 604).

Lack of Evidence

This is not a case in which the defendants are obliged to ask the Court to draw inferences from the evidence which they have offered. It is a case in which the evidence which the plaintiff has presented, whether believed or not believed, does not sustain the plaintiff's burden to prove the cause of action alleged — that is, a combination or conspiracy to destroy the plaintiff's business or to restrain or to monopolize trade.

There are at least three fatal defects:—

(1) There is no evidence in the case that the *reductions* in prices tended to create a monopoly or a restraint of trade;

(2) There is no evidence that the defendants combined or conspired to destroy the plaintiff's business;

(3) There is no evidence that the defendants agreed, acting in concert, to reduce prices to a point below what would yield a reasonable cost of producing and selling and a reasonable profit thereon or to destroy the plaintiff's business.

The *plaintiff's own evidence* showed that each reduction was made *without agreement* between the defendants and was only *to meet* the reductions made by the *plaintiff*.

General Reduction of Prices is not Restraint of Trade.

Even if there had been an agreement to lower prices the agreement would not have been one in restraint of trade, because general lowering of prices does not restrain trade.

There was no evidence of any reduction to drive out a competitor in a particular locality while keeping up prices elsewhere. There was no similar agreement.

Lowering prices generally is the antithesis of restraint of trade. No agreement among competitors to lower prices is necessary or important. A particular competitor does not need, for self-protection, any such agreement. Here lies the difference between lowering and holding or raising. A seller may fear to hold or to raise his prices unless his competitors will agree to do likewise, because otherwise he may lose trade to the competitors. There is no such danger in lowering. There is no incentive to make a restraining agreement. It has no effect on the prices. They are reduced just the same. The public gets the benefit.

Indeed, if prices have been maintained in concert, an agreement to lower them is not only not an agreement in restraint of trade but it is an agreement to remove an existing restraint of trade.

As matter of law, even had there been an agreement to reduce prices and a reduction of them pursuant thereto,

it would not have been an agreement in restraint of trade, or a restraint of trade.

It is not of itself a restraint of trade that manufacturers "as a necessary measure of self-protection, made generally material reductions in the prices" of the goods which they manufactured.

United States v. *International Harvester Company*, 274 U. S. 693, 708.

To reduce prices does not restrain trade.

A combination to reduce prices is not a combination to restrain trade.

Such a combination has no effect. The reduction is the same as if there were no combination.

Summary of Reductions by Story.

Prior to Paterson's reduction of November 18, 1927 and prior to each subsequent reduction, *Story* had broken the price below the *wholesale* price of any defendant. Defendants' retail prices were still higher than the wholesale — from 1¢ to 6¢ in accordance with the quantity (R. 578, 471, 472).

(a) October 10 to 15, 1927, Story tentatively agreed to sell to all the some two or three hundred *consumers* who were members of the Institute of American Meat Packers or the Institute of Equipment and Supply, and howsoever small the quantity, at 5% or .8¢ in case of sheets, and 5% and ½¢ or 1.3¢ in the case of rolls, less than Paterson's, Kalamazoo's and West Carrollton's prices to *wholesalers* (R. 569, 551).

(b) In October, 1927, Story first announced that they would sell to wholesalers at 5% or .8¢ below Paterson's, Kalamazoo's and West Carrollton's prices to wholesalers (R. 568, 550).

(c) November 8, 1927, Story announced that they would sell rolls at 5% and ½¢ or a total of 1.3¢ less than

Paterson's, Kalamazoo's and West Carrollton's prices to wholesalers (R. 568, 583).

Story continued these reductions to wholesalers uninterruptedly during the ensuing months (R. 571).

(d) In latter December, 1927, Story authorized a reduction of 2½% or .4¢ from the wholesale list price to the Big Four consuming packers (R. 573). (These four had received ¼ discount or .25¢ for many years (R. 573).)

(e) In December, 1927, Story authorized this same reduction to consumers, members of the Institute, big and little (R. 573).

(f) January 4, 1928, Story gave the Big Four 2½% reduction on the reduced price of 15¢ or .375¢ (R. 573, 553).

(g) January 17, 1928, Story made this same reduction of 2½% or .375¢ to all *consumers*, *big* and *little*, members of the Institute (R. 573, 552).

(h) January 26, 1928, Story made a reduction of 5% or .75¢ to a *consumer*, the Land O' Lakes Company (R. 574, 582), below the defendants' prices to the same company and .5¢ below their prices to the Big Four packers and .75¢ below the defendants' prices to *wholesalers*.

(i) This was equivalent to a quotation of this reduction to the Big Four as it undoubtedly became known to them immediately (R. 576) and they were larger users (R. 574).

(j) January and February, 1928, Story continued the reduction to wholesalers of 5% or .75¢ below Paterson's, Kalamazoo's and West Carrollton's prices (R. 573, 580, 582, 583).

(k) February 27, 1928, Story gave Swift or Armour a reduction of 2½% or .375¢ and ¼¢ — a total of .625¢ (R. 554).

(l) March 2, 1928, Story announced a 1¢ reduction (R. 575, 558).

(m) In March, 1928, Story sold to Land O' Lakes at a reduction of 5% or .7¢ from this price (R. 575).

(n) March 2, 1928, and thereafter Story continued to make the reduction of 2½% or .35¢ to consumers, big and little packers, members of the Institute (R. 580).

(o) March 2, 1928 and thereafter, Story continued a discount to wholesalers — a reduction in some cases of 5% or .35¢ (R. 580).

(p) March, 1928, Story made a reduction of 4¢ on wrappers from Paterson's, Kalamazoo's and West Carrollton's 95¢ prices for the same (R. 650).

(q) March 13, 1928, and thence through that Spring, Story sold Armour large quantities of Clover Bloom wrappers at a reduction of 6¢ below Paterson's, Kalamazoo's and West Carrollton's 59¢ prices for the same (R. 575, 560).

Story began and continued these cuts as cuts from Paterson's, Kalamazoo's and West Carrollton's wholesale prices (R. 567, 575) and to the past and existing trade of these concerns in order to improve Story's chances of getting that trade away from them (R. 581).

Before each reduction made by Paterson, Kalamazoo or West Carrollton, Story had already cut below their prices. On the reduction, Story continued to cut below their new prices (R. 571).

Story's treasurer's "understanding was that the others [the defendants] had reduced the price because Story's paper was of a superior quality and, therefore, the only way in which they could hope to sell against Story's superior paper was by having their price lower. That was his thought at the time. They were pretty certain that *Story had caused this reduction*" (R. 576). (Not italics in original.)

Cuts called Commissions.

The plaintiff made an unsuccessful effort to cloud its cuts, by calling its discounts a selling commission allowed in place of paying commissions or salaries to salesmen (R. 551, 568, 575, 580, 592). The 5% discount kept right on after Story employed salesmen. It was called discount and not selling expense on plaintiff's books (R. 577). The subterfuge was palpable.

Manifestly it made no difference to the defendants or to the defendants' customers, why the plaintiff gave its discounts or by what name the plaintiff called them. A consumer, who, because he was a member of a packers institute and because the plaintiff hoped to avoid paying salaries or commissions to salesmen, could get Jumbo Rolls from the defendants at not less than 16.5¢ but could get them from the plaintiff for 15.2¢ (R. 568, 551), was not likely to buy from the defendants until they reduced their prices to meet the plaintiff's cut. So it was with the general 5% or .8¢ cut from the wholesale price. The test was the *amount* which the customer had to pay, and not its name (R. 588).

Summary of Reductions by any Defendant.

Prior to each reduction made by any defendant or by West Carrollton, Story had already made substantially equal or greater reductions in actual prices or quotations to customers of one or another of the defendants, and, before reducing, the defendants had been informed of these facts. They made the reductions exclusively to keep their existing business and with no purpose to destroy Story's business (R. 180).

The only reductions alleged in the declaration are those of January 2, 1928 and March 9, 1928 (R. 9). The reductions proved were: —

(a) November 18, 1927 — a reduction of ½¢ a pound on rolls by Paterson, without concurrent or prior agreement with Kalamazoo or West Carrollton, on a single order (R. 506, 509).

(b) December 2, 1927 — a general reduction by Kalamazoo of ½¢ a pound on rolls, without concurrent or prior agreement with Paterson or West Carrollton (R. 161).

(c) December 5, 1927 — a general reduction by Paterson of ½¢ a pound on rolls, without concurrent or prior agreement with Kalamazoo or West Carrollton (R. 164).

(West Carrollton made no such general reduction (R. 539).)

(d) January 2, 1928 — a reduction of 1¢ a pound by Kalamazoo, without concurrent or prior agreement with Paterson or West Carrollton, preannounced a few days before by Kalamazoo to Paterson and to West Carrollton (R. 199).

(e) January 2, 1928 — a reduction of 1¢ a pound by West Carrollton, without concurrent or prior agreement with Paterson or Kalamazoo (R. 200).

(f) January 3, 1928 — a reduction of 1¢ a pound by Paterson, without concurrent or prior agreement with Kalamazoo or West Carrollton (R. 482).

(g) February 10, 1928 — the allowance by Kalamazoo of a discount of 2½% to certain meat packers, without concurrent or prior agreement with West Carrollton or Paterson (R. 541).

(h) February 10, 1928 — The allowance by West Carrollton of a discount of 2½% to certain meat packers, without concurrent or prior agreement with or knowledge on the part of Paterson or Kalamazoo (R. 286, 283, 541).

(i) February 13, 1928 — The allowance by Paterson of a discount of 2½% to certain meat packers, without concurrent or prior agreement with or knowledge on the part of Kalamazoo or West Carrollton (R. 490).

(j) March 2, 1928 — The allowance by Kalamazoo of a discount of 5% to Armour, without concurrent or prior agreement with or knowledge on the part of Paterson or West Carrollton (R. 526).

(k) March 2, 1928 — The allowance by West Carrollton of a discount of 5% to Armour, without concurrent or prior agreement with or knowledge on the part of Paterson or Kalamazoo (R. 535).

(l) March 5, 1928 — The allowance by Paterson of a discount of 5% to Swift, without concurrent or prior agreement with or knowledge on the part of Kalamazoo or West Carrollton (R. 499).

(m) March 9, 1928 — a reduction of 1¢ a pound by Kalamazoo, without concurrent or prior agreement with Paterson or West Carrollton, preannounced March 8th by Kalamazoo to Paterson and West Carrollton (R. 536, 358).

(n) March 9, 1928 — a reduction of 1¢ a pound by West Carrollton, without concurrent or prior agreement with Paterson or Kalamazoo (R. 359).

(o) March 9, 1928 — a reduction of 1¢ a pound by Paterson, without concurrent or prior agreement with Kalamazoo or West Carrollton (R. 479).

(p) May, 1928 — a reduction by Kalamazoo of 6¢ per thousand on printing of small butter wrappers, without concurrent or prior agreement with Paterson or West Carrollton, preannounced May 14 to Paterson and West Carrollton (R. 534).

(q) May 24, 1928 — a reduction by Paterson of 6¢ per thousand on printing of small butter wrappers, without concurrent or prior agreement with Kalamazoo or West Carrollton (R. 534, 480, 544).

(r) May 17, 1928 — a reduction by West Carrollton of 6¢ per thousand on printing of small butter wrappers, without concurrent or prior agreement with Paterson or Kalamazoo (R. 544).

Paterson's, Kalamazoo's and West Carrollton's Meetings.

Prior to November 18, 1927, most certainly the evidence does not suggest that the defendants had done anything separately or together, legal or illegal, which could affect the possible success of plaintiff's business.

From the beginning of plaintiff's manufacturing or selling in October, 1927, to the bringing of the suit on June 4, 1928 and thereafter, the correspondence, chronologically arranged, is in evidence to show what was done among the defendants and West Carrollton by letter (R. 103-470).

In this period the only meetings of Paterson, Kalamazoo and West Carrollton were on (1) December 1, 1927, (2) February 23, 1928, (3) March 31, 1928, and (4) May 14, 1928. The only evidence of what occurred at these meetings is from the witnesses called by the plaintiff — Moyer, Southon and Cashmore. Cashmore is Treasurer of Paterson, and Southon is Sales Manager of Kalamazoo. Moyer is not a defendant or an officer of a defendant.

There is nothing in the correspondence or in the prior and subsequent actions of the parties which is inconsistent with the testimony of these three witnesses as to what was said at these meetings.

There is nothing in the actions of the parties which necessitates or warrants an inference that they agreed to any more than they testified to, or that they had any purpose to destroy the business of the plaintiff in what they did at these meetings.

If it is permissible for the plaintiff to argue that Moyer, Cashmore and Southon, called by the plaintiff, did not tell the truth in respects in which the other testimony does not conflict with theirs, it still remains true that disbelief of their testimony does not constitute affirmative evidence of the contrary facts.

Ramsay v. *Ryerson*, 40 Fed. 739.
Pollock v. *Pollock*, 71 N. Y. 137.
Phillips v. *Gookin*, 231 Mass. 250.
Morris v. *Talcott*, 96 N. Y. 100.
Jaeger v. *Kelley*, 52 N. Y. 274.
Crook v. *Rindskopf*, 105 N. Y. 476.
Baltimore & Ohio v. *State*, 71 Maryland 590.
Shoninger v. *Day*, 53 Mo. Appeals 147.
Mercer v. *Wright*, 3 Wisc. 645.
Wallace v. *Berdell*, 97 N. Y. 13, 21.
Inhabitants of Wakefield v. *American Surety Co.*, 209 Mass. 173.
Hyslop v. *Boston & Maine Railroad*, 208 Mass. 362.
Beers v. *Prouty & Co.*, 203 Mass. 254.
Conant v. *Johnston*, 165 Mass. 450.
Morse v. *Hill*, 136 Mass. 60, 70.

The burden is on the plaintiff to establish these facts. Evidence is necessary.

Reported Actions of Story before December 1, 1927.

November 7, 1927, West Carrollton's Chicago Salesman, Moody, wrote Moyer of the indications that Story was going to cut the price to small *consumers*, members of the Institute, below West Carrollton's price to *wholesalers* and to the Big Four (R. 115). Already Story had agreed tentatively to do this (R. 569, 551).

November 12, 1927, Kalamazoo's Chicago salesman, Greenlee, wrote Kindleberger that Story had offered Hollis & Duncan to cut out the ½¢ differential on Pony Rolls, Standard Rolls or Jumbo Rolls (R. 121).

November 15, 1927, Paterson's San Francisco salesman, Gray, wrote Cashmore that Story had offered the large Pacific Coast paper house — the Zellerbach Paper Company — a reduction of 5% off whatever price they were already paying Paterson. In other words, that

whatever arrangement Zellerbach had with Paterson, Story would cut it 5% (R. 128).

November 16 and 17, 1927, Moody wrote Moyer that a customer claimed that Story had quoted him a better price than theirs (R. 134, 135).

November 17, 1927, Paterson's Chicago salesman, Cox, telegraphed Paterson that Hollis & Duncan had a proposition from Story for Jumbo Rolls at no advance (meaning without the usual ½¢ differential over sheets) (R. 135). Apparently he was five days behind Kalamazoo's salesman; for telegraphing indicates that Cox hastened to report to Paterson the day he got the information (R. 137).

Before December 1, 1927, in these ways the salesmen for Paterson, Kalamazoo and West Carrollton, respectively, in their contact with the Trade, had learned that Story was preparing to cut prices and was so quoting to their customers. The persons approached by Story were all customers of the defendants and West Carrollton (R. 581). The salesmen had reported to their respective employers. None of them had learned definitely the amount of the cuts except in the case of the ½¢ cut on rolls and the 5% cut proposed to Zellerbach.

Each defendant began December with the well warranted belief that Story was out to get away customers by cutting prices.

The Meeting of December 1, 1927.

Moyer, Southon and Cashmore met by prearrangement, at Cincinnati.

Moyer's testimony: — He told the others what he had heard about the manufacturing difficulty that Story was having and their lack of organization (R. 539, 160). As far as he recalls, there was no discussion as to abolishing the differential on rolls or that either of them mentioned it (R. 539). Nothing was said to him on the subject of

abolishing this differential or with respect to dropping the basic price (R. 540) or that Kindleberger was expecting to drop the basic price 1¢ around the first of the year. There was not any discussion of the price at all in his presence (R. 540).

Southon's testimony: — He does not recall whether the question of Story competition was the subject of discussion, or whether the question of prices of any parchment product was mentioned, or whether they considered as to whether or not the differential on rolls should be abolished (R. 527). It was possible that they discussed the differentials (R. 528). He does not remember saying that he thought Kindleberger was thinking of following their usual custom on the first of the year, dropping the price of parchment 1¢ a pound as usual, or anything said on the question of the price of their basic unit (R. 528).

Cashmore's testimony: — They discussed Story's special prices to the Trade (R. 483). He recalls nothing that was discussed except the reports from the Trade about Story's prices. Southon said he thought Kindleberger was thinking of following their usual first-of-the-year custom and was expecting to drop a cent a pound as usual (R. 483). He did not say anything. They did not leave with the understanding that all three were going to drop a cent a pound. There was no understanding (R. 483). Southon reported his information from the Trade that Story had a secret agreement with the Institute to sell the packers below their prices, quietly and by rebates (R. 484). They talked back and forth about a secret rebate, a cut to the packers, that Story was cutting prices (R. 484). They did not discuss prices (R. 485). Story had eliminated the differential on rolls. They were forced to meet it on the possibility of losing the business (R. 485). The other two said they had the same reports that Story was cutting prices (R. 486). No one suggested anything that should be done about it. Each

individual was privileged to do as he liked (R. 486). He told them that his company would have to do something to save the business (R. 486). He told them that Story had been eliminating the roll differential and that this involved Paterson doing the same (R. 487, 489). He mentioned that they had information from Hollis & Duncan that they had an offer from Story for their rolls at list price eliminating the ½¢ differential (R. 498). He said that Hollis & Duncan had offered the business provided Paterson met that price, and that Paterson did so (R. 498). They did not say anything about prices when he said he had reduced his (R. 498). Their talk December 1st was about the Hollis & Duncan Jumbo Rolls proposition (R. 501). He does not think that he told them that he was going to reduce (R. 501). He told them what he had done (R. 501, 506). He does not remember telling them anything except that they had met this Story competition — the differential on rolls (R. 507). It is quite likely that they talked about the import situation which was very keen at that time (R. 501, 87, 112, 96, 159, 158, 157, 151, 149, 146, 144, 133, 122, 114, 99). Southon said that he had heard from Chicago about the arrangement that Story had with the Institute for some rebate (R. 507). Nothing was said about price for the coming year except that Southon said that it was his opinion that Kindleberger was thinking about reducing the price. He did not say anything and he does not know that anything was said by Moyer (R. 507). He did not say that Paterson was going to make the waiver of the differential to Hollis & Duncan a general policy (R. 509). The others did not say that they were going to. No agreement was made about it. He is sure that nothing more was said on the subject (R. 509).

There is no evidence outside conflicting with this or indicating that there was any agreement or concert as to removing the differential or reducing the base price or to

destroy the plaintiff's business. The only evidence is to the contrary.

On December 2, 1927, Kalamazoo sent out its notice abolishing the differential on rolls (R. 161). Paterson did not. Paterson got some further reports from its salesmen in Boston and elsewhere (R. 502) of what Story was doing. Then, on December 5, 1927, Paterson sent out an announcement abolishing the differential on rolls (R. 164). West Carrollton did not abolish the differential (R. 539).

On December 5, 1927, Kalamazoo sent to the printer the make-up of its proposed January, 1928 wholesale price list at the old prices of December 11, 1926 (R. 530).

On December 6, 1927, Paterson ordered new printing at the old prices of December 11, 1926, with only the change to eliminate the roll differential (R. 516).

Facts Leading up to the January 2, 1928 One Cent Reduction.

There was no meeting after December 1, 1927, until February 23, 1928.

December 5, 1927, Kalamazoo received their salesman's report that Story was offering a 5% discount (R. 163).

Before December 8, 1927, Levin, of Story, told Kalamazoo's secretary that Story's policy was going to be to make the discounts to the wholesale dealers from the wholesale list of all the manufacturers (R. 592, 171). On the lowest base price, 5% was .8¢ a pound. It was more on the higher prices.

December 6, 1927, Paterson's Boston salesman, Chace, reported Story was offering 5% discount from the wholesale list (R. 165).

December 6, 1927, Kalamazoo's salesman wrote Kalamazoo as to his fear of losing business to Story because of their cuts in prices (R. 169).

December 8, 1927, one of Paterson's customers wrote Paterson that Story had offered them 5% off the list price (R. 173).

December 9, 1927, Kalamazoo's salesman telegraphed Kalamazoo that Story was closing business with one of Kalamazoo's customers at 5% below Kalamazoo's price and that the customer thought Paterson would meet the cut (R. 173).

By December 10, 1927, Story's cut of 5% under the wholesale price was getting to be general talk in the Trade (R. 180).

December 12, 1927, Kalamazoo's Chicago salesman reported to Kalamazoo that Story was giving ½¢ a pound, strictly confidential, under-cover rebate, to all packers members of the Institute (R. 184).

The December 15, 1927, issue of the Paper Trade Journal erroneously announced that Paterson had reduced its price ½¢ (R. 189).

December 15, 1927, Kalamazoo sent its January 2, 1928 price list with the 1¢ reduction, to the printer (R. 530).

December 17, 1927, Paterson's Chicago salesman wrote Cashmore of the misinformation in the Paper Trade Journal and said that their competitors were complaining and that Paterson ought to get in touch with them (R. 192). Paterson and Kalamazoo talked by telephone that day (R. 512). Paterson demanded a rectification by the Paper Trade Journal (R. 193).

December 19, 1927, West Carrollton, without prior talk with Kalamazoo, sent its January 2, 1928 price list with the 1¢ drop, to the printer (R. 540).

December 22, 1927, the Paper Trade Journal announced the error in its publication of price reduction by Paterson (R. 195).

It takes a week or more to figure the detail prices for one

of these price lists. Paterson had done nothing about this (R. 502).

Shortly before or after Christmas, 1927, or within two or three days before January 2, 1928 (R. 529, 530, 512, 502) Kalamazoo telephoned Paterson that Kalamazoo was going to reduce 1¢ a pound January 2d. Kalamazoo telephoned West Carrollton the same thing. It had been the custom to notify of any price reductions. Paterson did not say that they would do the same thing.

About December 30, 1927, Paterson's short bulletin of the basic reduction, effective January 2d, went to the printer (R. 502). The January 2d price list did not go to the printer until January 9th (R. 517).

Paterson's Chicago salesman told Paterson that he heard in the Trade that Kalamazoo and West Carrollton were going to come down (R. 484, 485).

Before this reduction was made Story had cut the price .8¢ and in the case of rolls 1.3¢ and to Paterson's, Kalamazoo's and West Carrollton's customers.

There is no evidence (1) that there was any agreement, conspiracy or concert to make this reduction or (2) that it was made to destroy plaintiff's business.

The 2½% Discount in February, 1928.

Immediately upon the 1¢ reductions at the beginning of January, Story began or continued to make the 2½% *discounts from the wholesale lists to large and small consumers*, members of the Institute, and the 5% discount to wholesalers (R. 573). On January 26, 1928, Story made the 5% discount from the wholesale list to the consumer Land O' Lakes (R. 574).

January 6, 1928, Paterson's Boston salesman notified Paterson that their customer reported that Story was offering the 5% off the reduced price — a cut of .75¢ below Paterson's price (R. 206).

January 6, 1928, West Carrollton's Chicago salesman wrote West Carrollton that one of their customers had informed him that Story had a lower price out, and commenting on this cut (R. 207).

January 9, 1928, Kalamazoo's Chicago salesman wrote Kalamazoo that Osman, of the Institute, said they had a signed contract with Story for the 5% rebate to members of the Institute and that Story had withdrawn it (R. 213).

January 12, 1928, West Carrollton's salesman made a similar report to West Carrollton (R. 224).

The salesman of the respective concerns continued to report their customers' statements of Story's cuts (R. 215, 219, 223, 225, 226, 227, 228, 230, 231, 232, 233, 234, 235, 237, 243, 248, 249, 251, 258, 265, 267, 273, 275, 276, 282, 284, 285, 290, 299).

January 24, 1928, Kalamazoo wrote its Chicago salesman that it was advisable to wait before deciding to meet Story's cuts (R. 246).

February 2, 1928, West Carrollton's Chicago salesman reported to West Carrollton that Story had said to customers that *Story had forced the other manufacturers to take off the ½¢ differential on rolls and to make the 1¢ additional reduction* at the beginning of January and that as soon as they got their production up to a satisfactory tonnage *Story was going to reduce* on 40-lb. parchment to *14¢* (R. 263), a further reduction of 1¢.

February 6, 1928, Paterson's Chicago salesman wrote Paterson that Story was offering 5% below wholesale in the East, and 2½% in Chicago, and that Story said that as soon as they get into production they would put another decrease of 1¢ per pound into effect (R. 272). This was the report which Story carried into effect on March 2, 1928.

On February 9, Kalamazoo's Chicago salesman made substantially the same report to Kalamazoo (R. 227).

February 9, 1928, this salesman urged Kalamazoo to do something to meet these cuts (R. 278).

On February 10, 1928, Kalamazoo by telephone authorized this salesman to meet Story's 2½% discount to the big six or seven packers and to the members of the Institute and to Barber and to the Allied (R. 280).

Not only was this to meet Story's discount already made, but also it was done without any prior communication with Paterson on the subject (R. 283).

West Carrollton's buyer commented on the fact that the reduction had been quoted without Paterson's knowing it (R. 286).

Paterson's treasurer, Cashmore, arrived in Chicago on February 11 and then first heard what Kalamazoo had done (R. 287, 491, 500). He said that this cut was a mistake. Paterson's Chicago salesman, Cox, told him that he had heard of it from Swift's buyer (R. 491). Cashmore did not talk with any of the salesmen of the other concerns (R. 491). He had Paterson's salesman verify the information by telephoning Swift's buyer (R. 500). In this way he learned that Kalamazoo had made the discount to meet Story's discount (R. 491, 500). Cashmore then authorized Paterson's salesman to meet it also (R. 491, 500). Paterson took its first order with this discount on February 13 or 16 (R. 490). Paterson at first gave the discount on paper only (R. 512, 292) and then learned from Swift's buyer that Kalamazoo was giving it on printing also (R. 512, 288). Then Paterson extended it to printing (R. 301).

February 17, 1928, Kalamazoo's Chicago salesman reported to Kalamazoo that Story had offered another consumer this 2½% discount (R. 299) and that he feared losing trade if Kalamazoo did not meet Story's price.

All this conduct was between the respective salesmen on the one hand and their respective employers on the other and not between the defendants.

The 5% Discount in March, 1928.

February 18, 1928, Paterson's Chicago salesman informed Paterson that Osman said there was going to be another price concession within thirty days, — apparently referring to Story's plan (R. 305).

February 20, 1928, Kalamazoo's Chicago salesman reported to Kalamazoo, Story's extension of the 2½% discount to another consumer (R. 315).

February 21, 1928, one of Kalamazoo's salesmen reported to Kalamazoo that Story had sold a consumer at the wholesale price less 5% which was .75¢ under Kalamazoo's price to the same customer (R. 317).

This seems to be Kalamazoo's first information that Story had cut the January wholesale prices as much as 5% to a *consumer*.

February 22, 1928, West Carrollton's Chicago salesman reported to West Carrollton that Story was making a price lower than West Carrollton's to members of the Institute and to the Big Four packers (R. 317).

February 24 and 25, 1928, Paterson declined to authorize any price change except to meet Story's competition on all large business (R. 322, 323).

February 27, 1928, Kalamazoo extended the 2½% discount to meat packers even if not members of the Institute (R. 325).

February 27, 1928, Paterson's Chicago salesman reported to Paterson a customer who had received a lower price from Story (R. 327).

February 28, 1928, Kalamazoo authorized their salesman to meet Story's 5% discount to Kalamazoo's customer Land O'Lakes but *not to go below it* (R. 329).

February 28, 1928, West Carrollton's Chicago salesman reported to West Carrollton that Swift's buyer had received from Story last Friday [February 24] a price of 14.75 less 5% on printing and paper and that Story's

price to the Institute was 5% discount from the wholesale price. This was ¼¢ plus 5% — a total of .9875¢ below the wholesale price (R. 332).

He said: — "You know Levin told the big buyers when he was here last that parchment could be sold at *14¢* lb and *yield a good profit*" (R. 332). This was a report that Story's general manager had in effect quoted a price of 14¢ sometime before February 28. Buyers with this information of an acknowledged profit at 14¢, would not pay more.

Up to this time neither Kalamazoo nor Paterson nor West Carrollton had given 5% discount even to the Big Four.

February 29, 1928, West Carrollton's Chicago salesman reported to West Carrollton that he could not get the big packers' business unless he was authorized to meet Story's cut (R. 336).

February 29, 1928, Swift put the 5% discount on an order to Paterson (R. 334).

March 1, 1928, Armour did the same to Paterson (R. 337).

This was the beginning of the 5% discount to the Big Four by either Paterson, Kalamazoo or West Carrollton.

Because Story had quoted it, the Big Four claimed it; and none of the concerns could get the business without granting it (R. 491, 515). There was no concert between them in granting it. They did it separately, because forced by Story's cut. It was not done before March 1.

March 2, Story made its 1¢ reduction. Kalamazoo, Paterson and West Carrollton each met this reduction on March 9 and stopped the 5%.

Kalamazoo's first Armour 5% discount order was received March 2 (R. 522).

West Carrollton's first Cudahy 5% discount order was received March 3 (R. 538).

Paterson's first Swift 5% discount order was received March 5 (R. 499).

The 5% discount was to meet the price and discount which Story had made before. It was not to cut under Story.

The Meeting of February 24, 1928.

Moyer, Cashmore and Southon and Dohan attended this meeting; Kindleberger may have been at it for a short time. There was no evidence of any agreement at this meeting to cut prices or to do anything to destroy the plaintiff's business. No meeting had been held since December 1, 1927. The four men were together for the meeting of the American Pulp and Paper Association (R. 541).

Moyer's testimony: — He was at the American Pulp & Paper Association meeting. He does not recall that he met any representative of Paterson or Kalamazoo there, but it would seem natural that he would (R. 541). It is probable that he met them (R. 542).

Cashmore's testimony: — He learned at the meeting that Story was operating further with the Institute, giving them a still better proposition than the 2½% but limited to business going through the Institute (R. 513, 323). Southon told him that Armour already had a lower price, Story being determined to get a great deal of the Armour business, and that the other large packers had not been advised of anything lower. Southon told him that Story had been quoting Beatrice Creamery and Blue Valley and Fairmont and other creameries 2½% below wholesale. Moyer told him the same about Best Foods (R. 530).

Kindleberger's testimony: — He does not remember attending the meeting, and thinks that he did not (R. 523).

Southon's testimony: — He undoubtedly mentioned Story's competition. They mentioned their experiences (R. 531).

There is no evidence that anything occurred at this meeting beyond an interchange of information as to the price cutting campaign which Story was carrying on. There is no evidence that any agreement or concert or common or separate prediction was made.

The March 9, 1928 One Cent Reduction.

March 2, 1928, Story announced a 1¢ reduction as it had been reported that they had predicted early in February (R. 272, 277).

This compelled Kalamazoo, Paterson and West Carrollton to meet this reduction or lose their customers. The reduction was reported by the respective salesmen to their respective employers (R. 342, 348, 350, 352).

They reported the fact that Story was cutting even the new price by a 5% discount (R. 344).

March 5, 1928, Paterson was advised of Story's price of 91¢ which was 4¢ under the wholesale price (R. 346).

March 6, 1928, Paterson's Chicago salesman reported that Story was quoting 1¢ below wholesale (R. 347).

There is no evidence that Kalamazoo, Paterson and West Carrollton had any conference as to what was to be done to meet Story's cut.

On March 7 or 8, Southon of Kalamazoo telephoned Moyer of West Carrollton that these discounts were driving him mad, two and five, and that he did not know where they stood and that they were going to meet Story's price of March 2 by coming out with a new price list (R. 542) and that he was trying to get Paterson. Moyer said good. He was not positive, but probably told him that he would do the same (R. 542). Southon said that 2½% and 5% and even 10% had been reported. He did not remember that Moyer said anything except that all these special discounts and confidential rebates were very confusing (R. 536). Southon telephoned Cashmore, of

Paterson, substantially the same thing (R. 536, 479). Cashmore told Southon there was nothing else to do but the same thing, we cannot help it (R. 479).

The price lists for this reduction had not been figured at this time. Bulletins were sent out by Paterson, Kalamazoo and West Carrollton, respectively, on March 9th. The lists followed toward the end of March (R. 542).

The March 31, 1928 Meeting.

This was a prearranged meeting of Cashmore, Moyer, Southon and Dohan. There had been none since February 24. There is no evidence of any agreement or prediction for the future or of anything to destroy plaintiff's business.

Moyer's testimony: — He assumes that there was a discussion of Story but he does not recall it. He sees no reason for that meeting (R. 543) on any subject. He wondered at the time why he stopped at it (R. 544).

Southon's testimony: — He does not remember whether they mentioned the Story competition. Nothing was said about price. Might have been commented on with the experience they were having with Story at that time. Commented on Story's price, — he did not comment on his. Cashmore did not on his. Moyer did not on his or on any price they might make in this new competition. He is sure of that. He was not planning any price reduction then. They talked about general business conditions and about the import situation. He does not remember what they said about imports. He believes Cashmore said something of his experiences in the East with imports, of vegetable parchment that was being distributed by certain jobbers in eastern territory, speaking about some of the jobbers down there still selling imported parchment. With reference to Story competition it was just a matter of possibly relating some of their own experiences (R. 533).

Cashmore's testimony: — Story was mentioned by all. There was no discussion about it. General business conditions were discussed (R. 478, 479).

Facts Leading up to the Reductions in the latter part of May, 1928.

Repeatedly from early March onward, the salesmen were reporting to their respective employers the cuts which the Trade reported that Story was making and offering (R. 352).

To jobbers, this was 5% or .7¢ below the wholesale prices of Paterson, Kalamazoo and West Carrollton (R. 353). It was 4¢ from a 95¢ price to Blanton (R. 560, 356, 389, 392) and various extra discounts to others (R. 365, 367, 373, 374, 375, 376, 379, 383, 397, 400, 402, 405, 413, 417, 419, 422, 427, 431). One salesman reported a cut by Story of 10¢ per thousand below retail (R. 367).

As early as March 13, 1928 Story began selling 59¢ butter wrappers to Armour at 53¢. This was continued all through the Spring (R. 575).

May 1, 1928, Kalamazoo's Chicago salesman reported this heavy cut and that Story was getting all of Armour's business on this (R. 416), a large share of which Kalamazoo had had before.

May 2, 1928, West Carrollton's salesman reported that Armour had given him substantially the same information (R. 420).

Paterson's Chicago salesman made substantially the same report to Paterson (R. 423). Paterson feared the reaction on Swift's business with them if the lower price to Armour was learned (R. 481).

Each concern recognized the danger to it of not meeting this large cut of Story's (R. 423, 426, 420, 435).

The Meeting of May 14, 1928.

Moyer, Southon, Cashmore and Dohan met by prearrangement.

There is no evidence of any concert or agreement to do anything or to destroy the plaintiff's business.

Moyer's testimony: — He told Southon and Cashmore that Armour had notified West Carrollton that unless they made a better price on printed parchment, and quarter-pound wrappers especially, they were going to take the business away from them; that Story was making better prices, and that they could not afford to pay more. Southon said they had brought the same proposition up to them. Cashmore did not say anything. Cashmore did not say that Paterson would reduce its prices. Southon said Kalamazoo was going to make a new panel for prices under sixty-three square inches at a lower stated price. Moyer did not say that he was going to do likewise. Cashmore said that he did not know, he was going home to figure his costs (R. 544).

Southon's testimony: — They related their experiences with Story. He mentioned printing prices. He does not think they said anything. He said Kalamazoo was experiencing some very mean competition from Story on a small printed butter wrapper and that because Kalamazoo had always carried a large stock of this Kalamazoo was going to meet Story's price. They did not comment. He does not recall Cashmore or Moyer saying they had met similar competition. He has no recollection of either of them saying anything about it (R. 534). There was some discussion about the different classifications of printing designs, that they had found costs varying in their wax paper division and possibly the same was true of parchment wrappers. Cashmore said he had always thought in parchment printing wrappers there was a variation in them (R. 535).

Cashmore's testimony: — There was no agreement. Southon spoke of reducing the butter wrapper price in order to save their business on these small sheets which were being sold in large quantities by Story at a lower price. He said Paterson could not help but do the same thing if Kalamazoo did it. He does not know what Moyer said (R. 481). They discussed general discounts Story was giving to the Trade (R. 482). They did not say anything about lowering their prices on this account. The two matters discussed were the Story discounts and this selling to Armour. There are always many subjects discussed as to business conditions. As to the question of Story's discounts to the Trade, nothing was said as to what they would do (R. 482). When Moyer mentioned the reduction in price he said that he did not blame him (R. 498).

Butter Wrapper Printing Reduction.

The reduction of 6¢ in butter wrapper printing prices in the latter part of May, 1928, brought the prices of Kalamazoo, West Carrollton and Paterson down to the price to which Story had cut it on March 13, 1928 and had continued to cut it until it was forcibly brought to the attention of each of the concerns by their respective salesmen early in May.

There is no evidence that the cut of any of them was made for any purpose except to save their own trade which they were threatened with losing by the cut which Story had made.

Special Concessions by Defendants Separately.

Paterson made special concessions to particular customers (R. 493, 500, 503). There is no evidence of any concert in this. The indications are that it was not

known even, to Kalamazoo or to West Carrollton. There is no evidence that either Kalamazoo or West Carrollton made these concessions. Swift had a special printing price from Paterson (R. 493). Where a customer was so large that a jobber must sell him at the wholesale list price, Paterson gave the jobber 5% on these particular sales (R. 500, 503). Only one of these jobbers was sold by Story (R. 578, 503). In other cases the jobber bought at the wholesale list price (R. 500). He made his profit by selling at the retail price, from one to six cents higher (R. 500, 471, 472).

All this was antipodal to concert or conspiracy.

Purposes of Parchment Association.

Because the trial of this case was focused on Story, the evidence as to the Association dealt chiefly with its relation, if any, to Story. In this way the evidence magnifies Story in proportion to the purposes of the Association.

The evidence introduced by the plaintiff shows that the purposes of the Parchment Association were lawful, and laudable, and not to create a monopoly or restraint of trade. Notwithstanding the looseness of the meaning of the word "association" it is probably an overstatement to call this an association. It had no organization, no officers, no records, and no funds or power to incur liability. It took no steps. The word meant little if any more than the inclination of the manufacturers to confer together from time to time on matters of interest to all of them. In recent years, each has had the same lawyer and has paid him separately an equal amount.

In the foregoing sense there was an association, like there has been in other branches of the paper industry, before Kalamazoo was incorporated (R. 519). The invitation to Kalamazoo to join must have come through the Department of Commerce (R. 519). Paterson and

West Carrollton were already in. As other companies entered the industry, they joined (R. 519, 538). Story set out, as above described, to cut prices 5% (R. 551). They made no request to join. They were not invited (R. 474).

Although the Association appears to cover the period of twenty or more years before Story was organized, the correspondence in evidence about it begins about two years before Story was organized (R. 25).

This correspondence begins with Dohan's advice to Paterson about the decision in the Pittsburgh Plus case and the applicable legal conclusions to draw from it. Next comes the parchment business in Germany (R. 26). Then comes a report of the Department of Commerce (R. 26). Then is a discussion of quality of water for manufacturing purposes (R. 27). Next is customers' methods of payment (R. 28). Then is the prospect of a meeting during the Paper Convention Week in New York (R. 28). Then comes the importance of the Import Committee of the American Paper & Pulp Association (R. 29). Then is a complaint about false advertising (R. 29). Then comes the foreign parchment situation and its effect on conditions of American manufacture (R. 30). Then dumping by foreign manufacturers is discussed (R. 30), and foreign parchment that is coming into the country, and the report of the Department of Commerce thereon (R. 30). Then comes comment on the unfavorable prospects of a parchment plant and other possible uses for parchment (R. 31). Then comes a letter from the American Consul in France thought to be valuable for the files of Mr. Bullock of the American Paper and Parchment Association (R. 31). Then comes Paterson's capacity to furnish waterleaf (R. 32). Then the annual fees are fixed (R. 32). Then comes correspondence with the Import Committee with reference to offerings of imported parchment (R. 32). Then comes a bill for

services as to imports and tariff (R. 33). Then comes disquiet over large importations of vegetable parchment into Philadelphia (R. 33). Then comes the subject of taxes (R. 34). Then is a discussion of fraudulent advertising of a competing product (R. 35) and the possibility of asking the assistance of the Federal Trade Commission (R. 35). Then comes the possibility of a campaign backed by the American Paper and Pulp Association against such advertising (R. 36). Then comes a proposal to get the evidence together for a meeting on the import situation and of the trade lost to each by importations (R. 38). Then comes the matter of definitions of vegetable parchment and a letter of Levin's concerning this (R. 39), and the proposed definitions and the importance of getting them right for use in subsequent tariff legislation (R. 39). They are stated in detail (R. 39–41). Then comes a discussion of separation in accounting of tenant property from manufacturing property and its effect on the outstanding bond issue (R. 42). Then comes the matter of definitions in reports for import matters before the Tariff Commission (R. 43), and the injury sustained from importation of parchment and its lower prices. Then come changes in definitions (R. 44). Then is the report on parchment imports for the Tariff Commission (R. 44). Then the definitions are revised (R. 45–47), and their submission to the American Paper and Pulp Association (R. 47). Then comes a discussion of other methods of financing (R. 48–51). Then is the matter of house building (R. 53). Then is a discussion of the sale of one of the waterleaf mills (R. 54), and its appraisal (R. 55). Then come arrangements for the meetings of the American Paper and Pulp Association (R. 55). Then there is more about appraisal of the waterleaf plant (R. 56, 57, 58). Then there is submitted the decisions of the Supreme Court in the Cement Manufacturers' case and the Maple Flooring Manufacturers' case (R. 59). Then comes more

as to the sale of the Modena waterleaf mill (R. 60). Then each company pays Mr. Dohan $500 for a year's services (R. 62). The possibility of the Modena sale continues (R. 62). Then comes the prospect of a meeting in Washington (R. 63, 64). Then comes postponement of the sale of the waterleaf mill (R. 65). The Washington meeting is abandoned (R. 66). New York is substituted (R. 68). Then Dohan sends the pamphlet "What Price Progress" (R. 69). Then arrangement is made for a meeting at the time of the Sesquicentennial in Philadelphia (R. 72). Then comes arrangement for a meeting of the Import Committee to follow up the matter of the recent letter of Mr. Bullock of the American Paper and Pulp Association about Belgian parchment (R. 73). Then is a discussion with a manufacturing man about various manufacturing conditions (R. 74). The meeting as to Belgian parchment matter is set (R. 75). The discussion of manufacturing processes continues (R. 75). Then come references to freight loadings (R. 76). Freight rates were discussed (R. 475). Then comes the expression of doubt as to whether the American mills can meet the Continental competition in the Australian market (R. 77). The discussion of the Australian business continues (R. 79). They discussed national advertising to create a greater demand for parchment for new uses (R. 521). Then arrangements are made for attending the Paper Convention (R. 81) which will make it possible to get in touch with Mr. Hecht and Mr. Bullock at the American Paper and Pulp Association (R. 81). Then comes the possibility of getting a new jobber for Paterson (R. 82).

Just before the meeting of February 25, 1927, comes the first reference to Story — a letter from Kalamazoo's President to one of Kalamazoo's salesmen (R. 83). He suggests that the actual over-capacity of the parchment manufacturing plants for the available business be called to the attention of these men before they start another

factory (R. 83). The letter stated the true situation (R. 522). Paterson was running 3 or 4 days a week (R. 522). Kalamazoo was running about 65% capacity (R. 518). Then comes a discussion of investigating with the Bureau of Animal Industry as to the kind of paper to be used in wrapping certain meats for health safety (R. 86). Then comes the difficulty with the import situation due to recent reports of offerings from Germany and the importance of getting the reports of imports (R. 87). Then comes the importance of attendance at the meeting on this account (R. 87). Then comes the matter of Dohan's charges (R. 88). Then Kalamazoo's President writes on April 22, 1927, to Kalamazoo's salesman about offering to sell the new concern a spare machine and the prospects for parchment (R. 89). Paterson's Treasurer writes Dohan a week later about Paterson's difficulties with buying resistance, producing lower prices (R. 90). Then Dohan writes the Shedd Creamery about a mill for sale (R. 91). Then Paterson's salesman reports to Paterson's Sales Manager about the new parchment mill rumors (R. 92). Kalamazoo's salesman reports a part of similar information to Kalamazoo (R. 93). Then come shipping problems, and the report of the Atlantic States Shippers Advisory Board (R. 94). Then Paterson's Treasurer writes to Dohan further information as to the new project (R. 95).

Then comes advice on Canadian tariffs on vegetable parchment, and suggestion of a meeting (R. 95). Then comes discussion of the quotations on imported parchment (R. 97). Then comes one of the offerings of imported parchment at a price below that of any of the defendants (R. 99). Importations of parchment from abroad had made great inroads on their business (R. 520). They had constant competition from imitation parchment (R. 520). Then comes payment to Mr. Dohan for his services. Then comes advice about price agreements (R. 101). Then Kalamazoo's salesman reports to Kalamazoo's

President as to the building that Story is doing (R. 102). Then comes an objection from outside as to the confusion in definitions in the parchment industry (R. 103).

This brings the matter to the date when Story began to quote the 5% cut in October, 1927. The actions of the defendants with respect to Story from this time on have been dealt with above.

Then comes revisions of the definitions in the parchment industry to meet the objections (R. 109). Outside complaints as to the definitions continue (R. 109). The Paper and Pulp Association's committee proposed to deal with the subject in Washington on November 29 (R. 110). Then comes the Customs Bureau report on importation of foreign parchment (R. 112). French importations are not the only ones. The Bureau believes there is no dumping (R. 112). The definitions discussion continues (R. 114). Then comes complaint of false advertising (R. 114, 122). Then come inquiries as to whether they can meet in Washington on the definitions matter (R. 123, 146, 151). Dohan's illness makes the Washington conference on definitions impossible. He takes the matter up by letter (R. 152). Proposed definitions are approved. November 29, 1927, Kindleberger thinks there is no need of a meeting (R. 159). December 21, 1927, Dohan, still ill, suggests a meeting (R. 195). Kindleberger suggests waiting until the meeting of the American Paper and Pulp Association in February (R. 196).

On January 9, 1928 Dohan advises as to possibilities of a South American trade and the tariff situation on it (R. 210). Dohan advises again as to these foreign tariffs (R. 258). On February 15, 1928, he deals with this again (R. 291). Then Dohan gives information that he has obtained as to pulp (R. 408). Then comes a merger of one of Paterson's jobbers (R. 408). Then comes the

matter of tariff revision (R. 413). Dohan thinks there should be a meeting (R. 422).

Then reports of importation of vegetable parchment are discussed (R. 429). The meeting is arranged (R. 434). In March, 1928, they discussed importation of vegetable parchment into eastern territory (R. 533). Preparation of brief is desired on the tariff, for the American Pulp and Paper Association's general tariff committee (R. 466). Kalamazoo approved Dohan's preparing this June 5, 1928, and then sent him material for it (R. 468). Then Dohan writes concerning a new manufacturing question (R. 469, 470). They discussed the low-priced business that was coming in from Belgium (R. 521).

Throughout, there is no evidence, either oral or written, that there was any association for the purpose of restraining or monopolizing trade or that anything was done tending to that end.

It is not unlawful to combine in association just because "uniformity of prices and limitation of production are necessary results of these activities of the defendants" and the dissemination of information tended to produce uniformity in price and "there is a substantial uniformity of price" and "variations in price by one manufacturer are usually promptly followed by like variation throughout the trade" and "any change in quotation of price to dealers, promptly becomes well known in the trade through reports of salesmen, agents, and dealers of various manufacturers" and "there were frequent changes in price, and uniformity has resulted, not from maintaining the price at fixed levels but from the prompt meeting of changes in prices by competing sellers" and the members are a combination.

Cement Manufacturers Protective Association v. *United States*, 268 U. S. 588, 604, 605.

Maple Flooring Manufacturers Association v. *United States*, 268 U. S. 563, semble.

Waterleaf.

Paterson and Kalamazoo manufactured their own waterleaf. West Carrollton purchased its waterleaf from the Wakana Paper Company, from the Mishawaka Paper Company (R. 538) and from Kalamazoo. The prices paid Kalamazoo for it were determined by the prices obtainable from Wakana and *vice versa* (R. 195, 284, 292, 302, 321, 331, 357, 360, 364, 365, 532). These prices were in accord with the prices that Story was paying to The Bryant Paper Company for its waterleaf (R. 580).

Prices not Reduced below Cost or a Reasonable Profit.

Plaintiff's declaration is based on the charge that defendants' act in combination to destroy the plaintiff's business was by agreement to reduce prices below a reasonable cost and profit (R. 8). There is no evidence to prove the allegation. Not only did the defendants not combine or agree to reduce, but also neither of the defendants reduced below a reasonable cost and profit.

Plaintiff's Treasurer did *not* think, when plaintiff quoted prices lower than those made by the defendants to the same customers and to the same classes of customers, that plaintiff was cutting the price "*below a fair price*" (R. 582). Kalamazoo's president did not think that its prices would require doing business at a loss or at a very small profit (R. 526). Even when running at one-half capacity plaintiff could manufacture at 14.2¢ per pound average (R. 578). Story's general manager was reported to say that a selling price of .14¢ for 40-lb. parchment would yield a good profit (R. 332).

Paterson's average price on all sales, wholesale and retail, in 1928 (R. 473, Exs. P–31 to 50) was: — January, 15.8; February, 15.6; March, 15; April, 15.2; May, 15.5; June, 15.4; July, 15.5; August, 15.1.

The plaintiff put in evidence the figures from the books of Paterson, Kalamazoo and West Carrollton (R. 473) to

show sales, costs and profits. They are before this Court as Exhibits P-31 to 50, K-332 and W-159, respectively. They show that the profits of the parchment departments (R. 545) after the payment of depreciation and taxes (R. 505), including income taxes, were as follows:—

Net Profits of Parchment Business of Defendants, Respectively.

1927	Paterson Exhibits 31–50 Inclusive	Kalamazoo Exhibit 353	West Carrollton Exhibit 159
January	$18,787.85	$29,740.65	
February	38,632.03	16,294.62	
March	50,502.67	23,191.51	
April	53,789.80	25,936.47	
May	44,380.29	21,450.52	
June	64,008.70	23,682.76	
July	59,374.38	23,253.19	$ 1,567.53
August	63,378.37	28,258.65	18,904.90
September	68,258.37	33,379.92	8,329.67
October	67,774.73	10,925.33	1,806.91
November	52,304.98	21,717.43	15,736.48
December	35,299.86	8,144.95	2,809.57
1928			
January	24,151.54	$16,980.95	6,257.91
February	23,311.97	16,787.14	11,547.38
March	28,678.47	24,281.58	1,755.24
April	19,302.15	22,485.42	13,542.98
May	38,551.55	15,617.00	7,769.64
June	39,605.90	19,977.79	—3,398.95
July	43,322.45	22,084.63	5,989.06
August	33,661.10	15,748.12	3,600.54
September		15,632.36	9,948.80
October			18,230.62

THIRD

THE PLAINTIFF HAS HAD A TRIAL BY JURY WHICH HAS RESULTED IN A VERDICT FOR THE DEFENDANTS WHICH CALLS FOR JUDGMENT FOR THE DEFENDANTS

The plaintiff introduced before a jury all the evidence that there was to show that the defendants were liable. That evidence was, as matter of law, insufficient to show any liability on the part of the defendants. Therefore, the defendant is entitled to a verdict. Under these circumstances, and expressly, "the jury find for the defendant" (R. 13).

The Constitution does not give a right to two jury trials.

When the jury has found for the defendant, the proper order is a judgment for the defendant.

In *Northern Ry. Co.* v. *Page*, 274 U. S. 65, judgment had been ordered for the defendant on an alternative verdict (67). In the case at bar, the District Court should have made the same order. In the case cited the Circuit Court of Appeals vacated the order and directed judgment for the plaintiff (68). This Supreme Court reversed that judgment (75). The case went to judgment for the defendant. The decision is a conscious one (67) that inasmuch as under the circumstances the jury has given a verdict for the defendant, judgment should be entered for the defendant.

CONCLUSION

The plaintiff's failure is due wholly to an attempt, with insufficient capital and with no newly patented methods, to enter an overcrowded industry to compete with established competitors by attempting to make sales not to new consumers but exclusively to existing customers of the competitors already in the field and to do it by cutting prices below those of the existing competitors. This is not merely the weight of the evidence. It is the only evidence.

The defendants have not combined to reduce prices. They discussed the plaintiff's price-cutting. They made their reductions separately. Some of them, they made without warning to the other competitors. Some of them, they told to the other competitors before they made them. Each made them, understanding that they were necessary in order to meet reductions already made by the plaintiff. They made them to keep their customers from yielding to the lower prices made by the plaintiff. They did not agree to reduce. It was not necessary. The reductions were not under the compulsion of an agreement. They were voluntary except in so far as they were compelled by the price-cutting war opened by the plaintiff. This is not merely the weight of the evidence. It is the only evidence. "Its first effort to obtain trade was to deal direct with the large packers and jobbers and offer a five per cent discount on the prices then offered by the defendants" (R. 615).

Respectfully submitted,

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